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No. 219

In the Supreme Court of the United States

OCTOBER TERM, 1967

**THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, ET AL.,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF CLAIMS**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-15a) is reported at 369 F. 2d 1001.

JURISDICTION

The judgment of the Court of Claims was entered on December 16, 1966. A motion for rehearing was denied on March 17, 1967. The petition for a writ of certiorari was filed on June 5, 1967. The jurisdiction of this Court is invoked under 25 U.S.C. 70s(c) and 28 U.S.C. 1255.

QUESTION PRESENTED

Whether a treaty provision—providing that the President may determine either to turn over the proceeds from sales of Indian land to the tribe, or to

invest them and pay over any earned annual interest, or to turn over part and invest part—is an express provision for the payment of interest on a judgment against the United States compensating for the low sales prices of the lands.

TREATY INVOLVED

The relevant portion of Article 7 of the Treaty of May 30, 1854, 10 Stat. 1082, 1084, between the petitioners and the United States, provides:

And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

STATEMENT

The Peoria Indians alleged before the Indian Claims Commission that the United States had sold certain of their lands at an appraised value rather than at public auction, contrary to the terms of the Treaty of May 30, 1854, 10 Stat. 1082. In its decision, the Commission held that the United States had breached the treaty conditions in the sale of the land, and it awarded the Peoria Tribe a judgment of \$172,726.04, as the difference between the price at which the lands were sold and their fair market value. The Peoria Tribe appealed on the ground that interest should have been allowed on that judgment. The Court of Claims affirmed the Commission (two judges dissenting in part).

ARGUMENT

The decision of the Court of Claims is correct. It is consistent with other decisions of that court and does not conflict with any decision of this Court. Moreover, the case is of narrow significance because of the specific Indian treaty involved. Therefore, we believe, further review is not warranted.

The law is clear that, aside from Fifth Amendment takings of property, the United States does not pay interest on judgments unless it has expressly consented in "affirmative, clear-cut, unambiguous" terms.¹ *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 590; *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654. The same principle applies with equal vigor in Indian cases. *United States v. Alcea Band of Tillamooks*, 341 U.S. 48; *Cherokee Nation v. United States*, 270 U.S. 476; *Loyal Creek Indians v. United States*, 118 Ct. Cl. 373, 97 F. Supp. 426, certiorari denied, 342 U.S. 813; *Confederated Salish and Kootenai Tribes v. United States*, 175 Ct. Cl. 451, certiorari denied, 385 U.S. 921; *Nez Perce Tribe v. United States*, 176 Ct. Cl. 815, certiorari denied, 386 U.S. 984.

The specific treaty between the United States and the petitioners did not require that the United States pay interest. As the court stated (Pet. App. 6a):

Whether we consider the foregoing language of the treaty separately and apart from the

¹ "Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof." 28 U.S.C. 2516(a).

remainder of that document or whether we construe it in connection with other articles of the treaty, we arrive inescapably at the same conclusion: Article 7 of the treaty conferred discretion upon the President to invest the proceeds or not, as he saw fit. There is neither agreement nor consent by the United States to pay interest upon the proceeds.

The court further observed (Pet. App. 6a):

The word "may" in Article 7 denotes that the signatories to the treaty vested in the President the discretion to pursue alternative courses of action. He could pay the proceeds directly to the Indians; he could *invest* them in "safe and profitable stocks"; or he could do both. There is no mandate that the President act in a single specified manner, and nowhere in the entire treaty may there be found an explicit promise by the Government to pay interest.

The dissenting judges below would have construed the treaty as requiring the investment of all funds that either accrued or should have accrued from the sales of land. However, as the majority stated (Pet. App. 8a): "[T]he 1854 treaty clearly specified that the disposition of the proceeds of the land sales was left to the discretion of the President. Therefore, it would be judicial treaty-writing for us to read into that agreement an express promise by the Government to pay interest." Moreover, the case principally relied upon by the dissent below (*United States v. Blackfeather*, 155 U.S. 180) is clearly distinguishable. The treaty there involved specifically stated that the United States would pay the tribe annually "five

per centum * * * as an annuity" on the fund, which was made up of the proceeds of land sales less certain deductions. There was no discretion, as here, to pay over the principal of the fund in whole or in part. Thus, the Court could conclude in *Blackfeather* (155 U.S. at 193): "If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five percent upon this amount until the whole fund was paid over." That conclusion cannot be drawn in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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